IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

C.W.P. No.230 of 2007.

Date of decision: 24.5.2007

Suresh Kumar ....Petitioner

-Versus-

State of H.P. and others ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting? No

For the Petitioner: Mr.Surinder Sharma, Advocate.

For Respondents: Mr.M.S.Chandel,A.G. with Mr.R.M. Bisht, Dy.A.G. for respondents 1,3&4.
Mr.Anoop Rattan, counsel for R-5.

Deepak Gupta, J.(Oral)

Elections to the Nagar Panchayat, Nadaun, District Hamirpur, H.P. were held in the year 2005. The petitioner as well as respondent No.5 herein had filed their nomination papers for being elected as Ward Members from Ward No.5, Nadaun. The nomination paper of the petitioner was accepted. The petitioner however objected to the nomination paper filed by respondent No.5 on various grounds. The nomination paper of respondent No.5 was rejected by the Returning Officer on 6.11.2005. Thereafter, the petitioner was elected and respondent No.5 filed an election petition challenging the election of the petitioner and one of the main

grounds taken was that the nomination paper of respondent No.5 had wrongly been rejected.

The petitioner was admittedly served in the election petition and was represented by a counsel but his counsel did not appear and the petitioner was proceeded against ex-parte. The Collector who is the prescribed authority to hear the proceedings came to the conclusion that the nomination paper of respondent No.5 had wrongly been rejected and allowed the petition on 5.10.2006. The petitioner herein filed an appeal to the Appellate Authority i.e. the Director Urban Local Bodies, Shimla and this appeal was dismissed by the Appellate Authority on 17.1.2007. The orders of the Collector as well as the Director are under challenge before us.

We have heard Shri Surinder Sharma, learned counsel for the petitioner, Sh.M.S.Chandel, learned Advocate General and Sh.Anoop Rattan, appearing on behalf of respondent No.5.

The first contention raised by Sh.Surinder Sharma is that the application filed by the petitioner for setting aside the ex-parte proceeding was wrongly rejected. According to the petitioner his counsel had filed power of attorney on his behalf before the respondent No.4 on 22.6.2006. The case of the petitioner is that the matter was adjourned to 19.7.2006 as noted by the petitioner's counsel. The allegation made in the writ petition is that the date was changed from 19.7.2006 to 28.6.2006 without informing the petitioner or his counsel and the petitioner was wrongly proceeded against ex-parte on 28.6.2006. As per the averments made in para 15

of the petition, the petition was thereafter adjourned to 5.7.2006 and thereafter to 19.7.2006. The petitioner alleges that he had filed an application for setting aside the order dated 19.7.2006 on 14.8.2006. He has however not filed copy of the application filed by him but has filed copy of the reply filed by respondent No.5. In the reply respondent No.5 took an objection that the petitioner had been proceeded against ex-parte on 28.6.2006 and not on 19.7.2006. Thereafter, the petitioner filed an application under Order 6 Rule 17 for amending the application under Order 9 Rule 7 seeking change of date of order from 28.6.2006 to 19.7.2006. Sh.Surinder Sharma contended that respondent No.4 gravely erred in not accepting the application filed by the petitioner.

We have called for the record of the case and have gone through the original order sheet. The order sheet shows that election Petition was filed on 21.1.2006 and was thereafter listed on 2.2.2006, 1.3.2006, 24.3.2006, 21.4.2006 and 19.5.2006. Though the petitioner has purported to file complete copy of the order sheet as Annexure PJ but this order sheet has been filed from 2.6.2006 onward and not prior to the said date. On 2.6.2006 the petitioner was represented by his counsel Sh.K.S.Parmar. The petitioner was also present in person and the case was adjourned to 22.6.2006. On 22.6.2006 the case was adjourned to 28.6.2006. No doubt there is some over-writing in the date but it is clear that the case was never fixed for 19.7.2006 or 20.7.2006 as contended by the counsel for the petitioner. On 28.6.2006 neither the petitioner nor his counsel were

present and they were proceeded against ex-parte. Thereafter, the matter was listed on 5.7.2006, 19.7.2006 and arguments were heard on 26.7.2006. On 10.8.2006 the matter was listed for further orders and thereafter the matter was listed for judgment on 30.8.2006. In the meantime the petitioner filed an application under Order 9 Rule 17 on 17.8.2006 for setting aside the ex-parte order dated 19.7.2006. The relevant portion of this application reads as follows:

> "3.That the applicant/respondent No.2 could not attend this Hon'ble court due to the reason that applicant/respondent No.2 was out of station on that very date and was under the impression that his counsel would have been presented on his behalf on 19.7.2006. But there was a resolution of Sub Division Bar Association Nadaun HP regarding the vacations during the month of July, 2006 which was accepted by this Hon'ble court. The counsel of the applicant/respondent No.2 was also out of station due to vacations. So the counsel could not appeared on behalf of applicant/respondent no.2 nor did he inform the applicant/respondent no.2 regarding this. The counsel of the applicant/respondent No.2 was under the impression that his appearance will be exempted in view of the said resolution of SUB DIVISIONAL BAR ASSOCIATION NADAUN HP."

The petitioner for reasons which are obvious did not annex a copy of this application with this writ petition. He has annexed copy of the reply filed in which the respondents took an objection that in fact the petitioner has been proceeded against ex-parte on 28.6.2006 and not on 19.7.2006. Thereafter, the petitioner filed an application to amend his application for setting aside the ex-parte proceedings.

The relevant portions of the application after amendment reads as follows:

> "3.That the applicant/respondent No.2 has engaged the counsel and the counsel appeared on behalf of applicant/respondent No.2 and counsel appeared in this Hon'ble Court on 2.6.2006 and filed power of attorney/vakalatnama and case was fixed for service for 22.6.2006 for service of respondent No.1, then on 22.6.2006, the counsel of the applicant/respondent No.2 again appeared in this Hon'ble Court and the respondent No.1 Rakesh Dhiman proceeded ex-parte illegally, even he was not duly served and the case was fixed for 20.7.2007, when the counsel of the applicant/respondent No.2 appeared in this Hon'ble Court on 20.7.06 who came back in the evening of 19.7.06 and case was not called, then the counsel of the applicant/respondent no.2 inquired the matter from the reader of this Hon'ble Court, then the reader of this Hon'ble Court intimated that the above titled case was fixed for yesterday i.e. 19.7.2006 and the applicant/respondent No.2 was proceeded ex-parte for non-appearance in this Hon'ble Court on 19.7.2006. It is pertinent to mention here that the order dated 22.6.2006 of this Hon'ble court has been tempered by changing the date 20.7.2006 to 28.6.2006 illegally, deliberately and in connivance which is an criminal offence, and then the case file was taken on 28.6.2006 behind the back of applicant/respondent no.2 and his counsel and the applicant/respondent No.2 proceeded ex-parte for non-appearance illegally, which is the against the natural justice And further case was further fixed for 5.7.2006 then 19.7.2006.
>
> 4.That the absent of the applicant/respondent No.2 was due to the reason stated above and not intentional."

A perusal of the above quoted two paragraphs show that the petitioner in his amended application has taken an absolutely new

plea. This is obviously an afterthought. Previously his case was that the case was fixed for 19.7.2006 when he was proceeded against ex-parte. After amendment absolutely new case was built up that the case was fixed for 20.7.2006 and when the counsel for the applicant appeared in the Court on 20.7.2006 he was informed by the Reader that the case had been fixed on 19.7.2006. Now the petitioner would have this Court to believe that the order sheet was tampered with.

We have seen the original order sheet and we are clearly of the view that on 22.6.2006 the case was not adjourned to 19.7.2006 or 20.7.2006. No doubt in the order sheet it appears that the figure '7' for the month was initially inserted and changed to '6' but the version of the petitioner that the date was 19 or 20 is totally false. The falsity of the case of the petitioner is also apparent from the totally contradictory stand taken by the petitioner in the two applications filed for setting aside the ex-parte proceedings. The explanation given by the petitioner being absolutely false and incorrect the same cannot be accepted.

It is well established law that the orders of the Court must be accepted to be correct and there is a heavy burden of proof on the person who alleges that such order sheets have been tampered with or changed. After seeing the record it appears to us that there has been no tampering in the record and in fact it is the petitioner who is telling blatant lies and is therefore not entitled to any indulgence. The application of the petitioner for setting aside the ex-parte proceedings was therefore rightly rejected.

On the merits of the case, the only ground on which the nomination paper of respondent No.5 was rejected was that he was a beneficiary in respect of certain constructions raised on Municipal/Government land. In this behalf it would be necessary to refer to Section 16(1)(c) of H.P. Municipal Act, 1994 which reads as follows:

> "16.(1)A person shall be disqualified for being chosen as and for being an office bearer of a municipality—
>
> (a)…….
>
> (b)……..
>
> (c)if he has encroached upon, or is a beneficiary of the encroachment upon, any land belonging to, or taken on lease or requisitioned by or on behalf of the State Government, a Municipality, a Panchayat or a Co-operative Society unless a period of six years has elapsed since the date on which he is ejected therefrom or he ceases to be the encroacher;
>
> Explanation—For the purposes of this clause, the expression "beneficiary" shall include the spouse and legal heirs of the encroacher."

A perusal of the aforesaid section shows that if a Returning Officer comes to the conclusion that the candidate has encroached upon or is the beneficiary of encroachment upon any land belonging to State Government, Municipality, Panchayat or Cooperative Society then the nomination paper of the candidate can be rejected. The objection raised by the petitioner to the nomination paper of respondent No.5 in so far as it relates to the allegation of encroachment reads as follows:

> "1.Some of his relatives/near dears/close friends are having buildings on encroached land but the monetary benefit is going to his pocket."

In our considered opinion, this was an absolutely vague allegation. A bare perusal of this application shows that there are no details about the land encroached upon nor there are any details of the relatives/friends of respondent No.5 who were alleged to have encroached upon the Government land. Whether the land in question is Government land or private land is also not clear from the allegation raised. Therefore, we are of the considered view that there was no material before the Returning officer to have rejected the nomination paper of the respondent No.5. The nomination form was rejected by the Returning Officer on the ground that there is suspicion about illegal encroachment on Government land by the brother of the respondent No.5 and other relatives. What was the material before the Assistant Returning Officer to come to such a conclusion is not clear. We had called for the file of the Assistant Returning Officer and we find that there was virtually no material before him at the time when he rejected the nomination paper of the respondent No.5. Therefore, the rejection of the nomination paper of respondent No.5 was not in accordance with law.

Consequently, there is no merit in the writ petition which is dismissed.

We would however like to clarify that we have not expressed any opinion on the question whether respondent No.5 has encroached upon or is the beneficiary of encroachment upon public

land within the meaning of Section 16(1)(c) of the H.P. Municipal Act. In the fresh elections to be held the petitioner shall again be at liberty to challenge the nomination paper, if any, filed by respondent No.5 on the same grounds by attaching appropriate evidence in support of his case. Any such objection, if raised, shall be decided by the Assistant Returning officer totally on the basis of the evidence and material before him without being influenced by the judgment passed in this writ petition.

Since we have come to the conclusion that the petitioner has been guilty of making false and reckless allegations, we burden him with costs of Rs.5000/-. These costs shall be paid to the State of H.P. and to respondent No.5 in equal shares.

(Deepak Gupta),
Judge

May 24, 2007.
PV

(Surinder Singh),
Judge